SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
OCT 7 1956
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY ET AL.,

vs. *Petitioners,*

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the court below (R. 428-438) is reported at 220 F. 2d 666. The oral opinion of the district court (R. 413-420) is not reported. The district court's findings of fact and conclusions of law appear at R. 18-48.

Jurisdiction

The judgment of the court of appeals (R. 438) was entered on March 1, 1955. A petition for rehearing was denied on April 15, 1955 (R. 439). The petition for writ of certiorari was filed on July 13, 1955 and granted on October 10,

1955 (R. 440). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Statutes and Regulations Involved

The pertinent provisions of the state and federal statutes and regulations involved are set out in the Appendix, *infra*, pp. 52-58.

Question Presented

The basic question, as presented in the Petition for Certiorari, is:

Whether agents of the Department of the Interior, purporting to act under the Utah "abandoned horse" statute, may confiscate and destroy livestock belonging to Navajo Indian wards of the United States, as a predetermined method of driving the Indians from their ancestral homes on the federal range, without liability to the Indians under the Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2671 *et seq.*

For purposes of the present brief, this basic question may be subdivided, as follows:

1. Whether, in view of the enactment by Congress of the Taylor Grazing Act, there was any room for the operation of the Utah "abandoned horse" statute.

2. Whether, assuming the applicability of the Utah "abandoned horse" statute, there was compliance with its provisions so as to justify the confiscation and slaughter of the Indians' horses.

3. Whether, assuming compliance with the provisions of the Utah "abandoned horse" statute,

(a) the posting of written notices in English was sufficient as a matter of due process of law to affect illiterate non-English-speaking Indians; and

(b) there was a discrimination against the Indians in its application so palpable as to constitute a denial of equal protection of the laws.

4. Whether the award of damages was proper.

5. Whether the temporary injunction against further interference with the Indians by agents of the United States was properly issued.

Statement

Petitioners, Navajo Indians and wards of the United States, instituted the present action under the Federal Tort Claims Act to recover damages for the unlawful slaughter of their horses by agents of the United States. The authority of the agents to take the action complained of was admitted by the United States Attorney at the trial (R. 64).

The following facts were found by the district court (R. 18-41), after hearing voluminous testimony (R. 55-268, 282-413):

From time immemorial, petitioners and their families have lived in permanently constructed "hogans" upon an area of what is now public land of the United States in the southeastern corner of Utah. The Navajo Indians are herdsmen, and for many generations have continuously grazed horses and other livestock upon the land. (Fdgs. 1, 8, 17; R. 18, 24, 28.) In view of the limited resources of their country, the horse has become a vital part of these Indians' culture and economy, serving as beast of burden and as means of transportation, and, indeed, as a part of their religious life (Fdgs. 9-14; R. 24-27).

Following passage of the Taylor Grazing Act of June 28, 1934 (*infra*, pp. 52-53), the area used by petitioners was incorporated within Utah Grazing District No. 6 (Fdg. 3; R. 19-20). Permits to graze in that area were issued to white livestock operators (Fdg. 4; R. 20). Until 1946, the Navajos were not disturbed in their use of these lands for grazing purposes in common with non-Indians. However after the employment of a new federal Range Manager in that year, Kinnaman by name, respondent's agents commenced a deliberate and increasingly intensive campaign

of harassment and molestation to frighten the Navajos into surrendering possession of the area. Federal officers threatened the destruction of livestock and the imprisonment of individual Indians. They went so far as to seize and chain the wives of four of the petitioners—one with an infant in arms. On another occasion, they threatened to take small children from a Navajo widow, to put her in jail, and to destroy her livestock unless she left the country. She left immediately. (Fdgs. 17-20; R. 28-31; see also R. 163, 166-167, 170, 174, 301-302.)

In 1950, resorting to more regular procedure, the United States brought suit in the same court where the present action was later brought, to compel the removal from the range of the livestock owned by the present petitioners (R. 76). See *United States* v. *Hosteen Tse-Kesi*, 93 F. Supp. 745 (D. Utah; October 31, 1950). The district court's judgment of dismissal, on the ground that the proceeding would require the judiciary to perform duties vested by law in the Secretary of the Interior, was reversed (*United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C. A. 10; August 30, 1951), and the case was reinstated for trial on the merits. Subsequently, following the destruction of petitioners' horses, of which complaint is made in the present case, the United States represented "that the defendants have returned to the Reservation and that there are no more trespassers," and the district court on June 27, 1953 dismissed the proceeding as moot (Fdg. 18 at R. 29).

At about the same time, local stockmen had instituted similar proceedings in the Utah state courts. See *Young* v. *Felornia*, Utah , 244 P. 2d 862 (May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952).

Kinnaman, the Department of the Interior's Range Manager, did not await the ultimate disposition of either of these lawsuits in the orderly course of judicial proceed-

ings. With full knowledge that the question of petitioners' right to graze their livestock was still before the U.S. District Court (R. 76-78), he initiated administrative steps, at his own instance (R. 90) and without reference to the Advisory Board (R. 93), looking to the destruction of the Indians' horses—and only the Indians' horses. The destruction of the horses continued after the present case was filed and while its trial was in progress (R. 82, 84).

The federal regulations promulgated pursuant to the Taylor Grazing Act that deal with livestock trespasses on public lands require that any "alleged violator * * * be served with a written notice * * *." 43 CFR 161.11(a), *infra*, p. 54; see Fdg. 5 at R. 21. No such notice was served in this case (R. 75-76, 414), although the Government agents knew to whom the horses belonged and could identify their brands, all of which were plain, and some of which were recorded under state law (Fdgs. 24, 28, 30; R. 34, 36-37; see also R. 154-157, 246, 252). Instead, Range Manager Kinnaman purported to invoke a state statute, commonly referred to as the Utah "abandoned horse" statute, which had been enacted in 1927, seven years prior to the date of the Taylor Grazing Act, (Fdg. 6, R. 22-24). During the period in controversy, this was Title 64, Chapter 2, Utah Code Annotated, 1943; it is now Title 47, Chapter 2 of the Utah Code Annotated, 1953; its relevant provisions are set forth *infra*, pp. 55-58.[1]

Under Section 1 of the Utah statute, *infra*, p. 55, an "abandoned horse" is defined as one that is "unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding * * * running at large upon the open range of this state * * *. An animal not bearing

[1] As a matter of convenience, we cite the Utah statutes throughout this brief as they appear in the 1953 edition of the Utah Code Annotated. The substantive provisions in every instance are identical with those appearing in the 1943 edition.

a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded." In providing a method of eliminating abandoned horses, so defined, from the range, the Utah statute (*infra*, pp. 56-57) calls for published and posted notices, authorized by the Board of County Commissioners concerned, to the effect that the elimination of such livestock would begin on a certain day.

On July 10, 1952, the first published notice of a program to eliminate "abandoned horses", purporting to emanate from the San Juan County Board of County Commissioners, was prepared by Kinnaman and delivered to the San Juan Record, a newspaper, where it was published (Fdg. 21, R. 31).

One of the contested issues in this case is whether that notice was published pursuant to a resolution stating that it was passed by the San Juan County Board of County Commissioners on July 9, 1952; for the text of the "resolution," see Fdg. 21, R. 32.

It is clear that the foregoing Board held its regular meetings on the first Tuesday of each month (R. 382), a date which in 1952 fell on July 1, August 5, and September 2.

There was a conflict of evidence as to whether the abandoned horse program was discussed at the Board's July 1 meeting. Two Commissioners testified that it was Kinnaman who broached the subject and requested the passage of an authorizing resolution (R. 363, 375, 383). They also testified that such a resolution was passed (R. 359, 375, 376, 383), and that Kinnaman and the County Attorney were directed to do the necessary drafting (R. 385). But the minutes of the July 1 meeting reflect no discussion of abandoned horses and do not contain any resolution on the subject (R. 150-151).

It was testified without contradiction that the Board did not meet on July 9 (R. 371, 383, 387), the date stated in the resolution. The record does not clearly establish just when the resolution was signed (R. 372, 387). One of the Commissioners signed it at his home (R. 387). It was also established that there were no special meetings of the San Juan Board of County Commissioners between July 1 and September 2, 1952 (R. 150, 387).

The first mention of abandoned horses in that Board's minutes appears in those of its September 2 meeting, which reflect a motion duly passed to insert therein the resolution dated July 9 (R. 148-149).

The district judge, after commenting on the witnesses' lack of frankness while they were testifying (R. 362, 368), thereafter formally expressed the opinion that they were not telling the truth concerning the adoption of the resolution (R. 414-416). He accordingly found that the resolution was not adopted prior to the September 2, 1952, meeting (R. 32, 42-43).

Apart from their participation in the foregoing adoption of a back-dated resolution, the Board of County Commissioners had nothing further to do with the plan of respondent's agents, Kinnaman et al., to eliminate petitioners' horses, either in authorizing the same or in carrying out the plan (Fdg. 21 at R. 32-33.)

The notice, above-mentioned, was in the English language, and was printed in the newspaper once a week for four weeks, from July 10 to August 8, 1952 (Fdg. 21 at R. 31-32). Kinnaman and another federal agent "had printed in the English language and then posted in the City of Monticello and at various places surrounding and within the area herein concerned no less than five of said notices which were in the same words as the notice printed in the San Juan Record newspaper" (Fdg. 21 at R. 33).

Petitioners, the district judge found, "speak only the Navajo language, which is an unwritten language" (Fdg. 15 at R. 27).

Beginning on September 20, 1952, and continuing until the present action was instituted on March 20, 1953 (R. 5), the respondent's agents captured and completely destroyed the Indians' horses (Fdg. 19, R. 29; R. 42-43, 54).

The animals were rounded up on the range and were either driven or hauled in trucks to a Government-owned or controlled corral 45 miles away. Horses which could not be so handled were shot and killed by the Government's agents on the spot. The remainder were accorded brutal treatment: the horses were so jammed together in the trucks that some died as a result, and in one instance, the leg of a horse that inconveniently protruded through the truck body was sawed off by a federal employee, one Dee P. Black. (Fdg. 23, 25; R. 33-35.) Later, the animals were taken in trucks to Provo, Utah, a distance of 350 miles, where they were sold to a glue factory and horse meat plant for about $1,700—at around 3 cents a pound (R. 93, 293)—no part of which was received by petitioners (Fdg. 24; R. 34).

Respondent's agents were engaged in the wholesale slaughter of Indian livestock, without regard to existing property rights, as part of a preconceived plan to drive these Indians from their homes by destroying their means of livelihood (R. 45, 47).

The district court specifically found that respondent's agents knew that the horses which they planned to and did kill belonged to petitioners (Fdgs. 28, 30; R. 36-37, 38). It was the Indians that these federal agents sought to remove (R. 45, 47). The government agents' concern was not with the Indians' 153 horses and burros (Fdg. 31; R. 39) on an area where permits had been issued for the grazing of 3,899 cattle and 33,818 sheep owned by white men (R. 410).

Consequently, respondent's agents did not intend to permit the redemption of any Navajo horses and granted petitioners no opportunity for redemption (Fdg. 24; R. 34). On one occasion, when one of the petitioners located his horses and asked permission to reclaim them, federal agent Dee P. Black asked payment of $60 per head, a sum Black knew the Indians could not pay (Fdg. 26, R. 35; see also R. 251, 261). In another instance, petitioner Hosteen Sakezzie and his family tracked their animals 35 miles to the Government corral, where Sakezzie requested Black to return his horses. During the conversation, one of the white stockmen left in his car and returned in a few minutes with several men armed with rifles, the loading mechanisms of which were worked before the Indians to convey to them the understanding that respondent's agents were prepared to shoot the Indians if they attempted to retake their horses. Sakezzie and his family became so frightened and intimidated by the threatening display of firearms that they departed peaceably and returned to their hogan without obtaining their horses. (Fdg. 27 at R. 36; see also R. 200-201, 212-214, 230-232.)

By contrast, five horses belonging to white men and unavoidably gathered with petitioners' horses were delivered by federal officers directly to the pastures or corrals of their owners, upon payment of a handling charge of only $2.50 per head (Fdg. 26, R. 35; see also R. 115-117).

The district court concluded that the provisions of the Utah "abandoned horse" statute on which the Government agents relied were not applicable, because Congress, by enactment of the Taylor Grazing Act, had undertaken complete regulation of grazing on the public domain; that the requirements of the Taylor Grazing Act and of the regulations thereunder respecting written notice, particularly 43 CFR § 161 (*infra*, p. 54), had not been complied with by respondent's agents; that, even if the Utah statute had

been applicable, its provisions concerning authorization from the Board of County Commissioners had not been followed or satisfied; and that, in any event, petitioners' horses were not abandoned within the meaning of the Utah statute. (R. 41-45, 413-417.)

In considering the amount of damages to be awarded, the district court took into consideration the unique position of the horse in the Navajo culture and economy, and the unique value to the present petitioners of the animals that respondent's agents had slaughtered (Fdgs. 8-16, 29; R. 24-28, 37-38). The district court further took into consideration the consequences, in terms of financial loss, visited upon these petitioners by the acts of federal officers in wantonly destroying the basic means by which they gained their livelihood and indeed maintained their way of life and their very existence (Fdgs. 31, 1-3; R. 39-41).

The court specifically found: The Navajo's horse is part of his way of life, specially trained and bred over many generations, essential to his spiritual and material well-being. Peculiarly adapted to the desolate country in which petitioners live, these horses can carry heavy burdens for up to three days without food or water. (Fdg. 15; R. 27.) They are used to till the dry land crops; they haul water, wood and supplies for great distances; they transport petitioners' families, the aged, and the sick (Fdg. 10; R. 25). Understanding only Navajo commands, the horse is the prized possession of the Navajo (Fdg. 15; R. 27). A horse is an inseparable part of Navajo family and religious life, the best horse being selected to ride with his dead master into the after world (Fdg. 14; R. 26-27).

For the wanton destruction of that unique asset, and for the consequential damage to which petitioners were subjected (Fdgs. 1-3; R. 39-41), the district court awarded judgment for $100,000 (R. 49-50). *Sua sponte* (see R. 417-418),

the district court also enjoined the respondent and respondent's agents from further molesting petitioners pending further action by the court (R. 48-49).

On appeal, the court below reversed the judgment of the district court and directed that the injunction be dissolved, with judgment to be entered for the United States (R. 438). The court based its decision on the applicability of the Utah "abandoned horse" statute (R. 435), and, disregarding the specific findings of the district court to the contrary (R. 32, 42-43, 414-416), held that the procedural provisions of the state law had been complied with in the slaughter of petitioners' animals, and that those animals were "abandoned" within the meaning of the state law (R. 435-438).

This Court granted certiorari (R. 440).

Summary of Argument

I. Here the provisions of federal law—the Taylor Grazing Act and the implementing regulations thereunder—are in direct conflict with the provisions of the Utah abandoned horse statute which the court below held to be justification for the destruction of petitioners' horses and burros.

The Taylor Grazing Act grants petitioners affirmative preference rights for grazing and absolute rights to graze animals for domestic use. The Utah abandoned horse statute confers no rights.

The Federal Range Code, adopted to implement the Taylor Grazing Act, requires that any alleged violator of the Act or of the Range Code be served with written notice, either in person or by registered mail. The Utah abandoned horse statute, however, provides only for notice by publication.

The reservation for state police power in Section 16 of the Taylor Grazing Act refers only to police power in the narrow sense, viz., state laws relating to health and welfare.

That provision did not leave any scope for the operation of state laws in actual conflict with the federal scheme for regulating grazing on the federal range.

Moreover, the Government agents here were not authorized to invoke the Utah abandoned horse statute. The Taylor Grazing Act does not expressly empower Government agents to rely on state enforcement machinery, and its self-executing penalty provision would appear to negative any such reliance. So much of the Federal Range Code as purports to authorize invocation of "local impoundment law and procedure" is therefore *ultra vires*. In any event, the Utah abandoned horse statute is not an impoundment law. It is a measure dealing with nuisances; the Utah impoundment act, an entirely different statute, far from authorizing what was done here, declares the round-up which was actually involved here to constitute a misdemeanor.

II. But even if the Utah abandoned horse statute were held to be applicable, its provisions were not followed, and so could not justify the torts committed here.

Statutes imposing penalties and forfeitures are always strictly construed, and the same is true of statutes providing for summary proceedings, where literal and exact compliance is required. The fundamental error of the court below was that it construed the Utah abandoned horse statute broadly and was satisfied with only colorable compliance therewith.

There was in fact no compliance with the Utah abandoned horse statute. The Board of County Commissioners did not authorize the round-up program until after the publication of the notices had been completed. The pretended and predated resolution that purported to authorize the round-up was never validly adopted before then.

Moreover, petitioners' horses were not abandoned within the meaning of the Utah statute, first, because they were

duly branded with recorded brands, and second because in fact they were not abandoned. Here the Government agents knew that the horses they rounded up and destroyed belonged to these petitioners.

III. Even on the assumption, *arguendo*, that there was compliance, the application of the Utah abandoned horse statute to petitioners involved a denial of constitutional protections.

The notice given petitioners was so inadequate as to deprive them of due process of law. They were illiterate Indians, speaking only the unwritten Navajo tongue, whereas the notices were in English, posted on the range and published in a newspaper. The means employed could not have been more carefully devised to withhold information from those who were to be affected by the notice. Moreover, the Government agents knew that it was these petitioners' animals that they sought to round up. Thus they were in a position to give personal notice on this occasion, as they had done in the past.

More than that, both in the administration of the Taylor Grazing Act as well as in the Government agents' administration of the Utah abandoned horse statute, there was discrimination against these Indian petitioners and in favor of white stockmen so palpable as to amount on this record to a denial of equal protection of the laws.

IV. The district court's award of damages was based on specific findings as to the unique value of the Indians' animals and as to the consequential damages suffered by reason of the depredations here complained of. Those findings are supported by evidence. The consequential damages reflected in the judgment were proper as a matter of Utah law, and were not foreclosed by anything in the Federal Tort Claims Act. The judgment was proper under Rule 20(a), F. R. Civ. P., and, to the extent that individual peti-

tioners might have insisted on separate judgments, such objection has been waived.

V. The district court properly enjoined the Government's agents from further molesting petitioners. After the depredations here complained of had succeeded in driving petitioners from their homes, Government counsel obtained dismissal of a pending suit to adjudicate petitioners' rights to the area here in question on the basis that it had become moot. Those who initiated the destruction of petitioners' horses were aware at that time of the pendency of that suit, and moreover were still carrying out such destruction when the present action was on trial. In addition, the Government's agents were turning over to white stockmen land that some of the petitioners had been occupying. In those circumstances, the injunction was proper under familiar equitable principles.

Petitioners concede that the injunction should be modified so that it will not run against the United States *eo nomine*.

Argument

I. THE INDIANS' RIGHTS UNDER THE TAYLOR GRAZING ACT COULD NOT BE AFFECTED BY THE UTAH ABANDONED HORSE STATUTE.

As has been shown, agents of the United States purporting to act under color of a state statute, wantonly destroyed some 150 horses and burros belonging to petitioners, and the court below, reversing a judgment in their favor for damages, has held that such destruction was lawful, on the ground, *inter alia*, that the state statute—the so-called Utah abandoned horse law—remained in full effect notwithstanding the subsequent enactment of the Taylor Grazing Act.

This Court has frequently divided on the question whether Congress has so preempted a particular field that all state laws dealing with the same subject matter are rendered

inoperative, even in the absence of a direct conflict, or in a situation where federal authority under the federal statute had not been exerted. E. g., *Hines* v. *Davidowitz*, 312 U. S. 52; *Bethlehem Steel Co.* v. *New York State Labor Board*, 330 U. S. 767.

But it has never been doubted, not even by the court below in this case (R. 435), that where there is a direct conflict between the provisions of the state and federal laws that deal with the identical subject matter, the state law cannot be given effect.

We shall show that there was such a conflict, in two material respects.

A. *The Taylor Grazing Act Gave the Present Petitioners Affirmative Rights With Respect to the Grazing of Their Horses and Burros That Were Not Contained in the Utah Abandoned Horse Statute*

A reading of the Taylor Grazing Act shows that petitioners were entitled to graze their horses and burros on the land from which those animals were taken by federal agents.

Section 3 of that Act (43 U. S. C. § 315b; *infra*, p. 52) authorized the Secretary of the Interior to issue grazing permits to "bona fide settlers, residents, and other stock owners", and directed that preference in the issuance of such permits be given "to those within or near a district who are * * * bona fide occupants or settlers * * * as may be necessary to permit the proper use of lands * * * occupied * * * by them * * *."

The findings here (Fdgs. 1, 8, 17; R. 18, 24, 28) make it crystal clear that petitioners had occupied the lands from which their horses were taken since time immemorial.

Next, Section 5 of the Taylor Grazing Act (43 U. S. C. § 315d; *infra*, p. 53) directs the Secretary to permit "the

free grazing within such districts of livestock kept for domestic purposes." The implementing regulation is 43 CFR 161.6 (*infra*, p. 53).

The findings show that the horses and burros for which petitioners seek compensation here were in fact domestic animals (Fdgs. 8-10, 12-14; R. 24-25, 26-27).

Thus there was a sharp and diametrical conflict between state and federal law so far as the quantum of petitioners' grazing rights were concerned. The state law gave them nothing, whereas the federal law gave them affirmative preference grazing rights for their livestock and absolute grazing rights for all stock used for domestic purposes.

The federal officials should therefore have accorded petitioners the grazing rights Congress intended them to have, and should not have rounded up their horses and burros to be sold for glue.

B. *The Taylor Grazing Act and the Regulations Thereunder Provided for Personal Notice to Trespassers on the Federal Range, Whereas the Utah Abandoned Horse Statute Provided Only for Notice by Publication*

But even if it be assumed, contrary to the plain provisions of the Act of Congress, that petitioners' horses and burros were not lawfully on the public range, still these animals were not dealt with in accordance with the Taylor Grazing Act and its implementing regulations.

Section 2 of the Act (43 U. S. C. § 315a; *infra*, p. 52) authorized the Secretary of the Interior to make rules and regulations to accomplish the purposes of the legislation. Acting under that authority, the Secretary promulgated the Federal Range Code (43 CFR 161.1 *et seq.*), which made provision, *inter alia*, for the service of written notice to any alleged willful violator of the Act or of the Range Code.

See 43 CFR 161.11; *infra*, p. 54. Such notice is required to be served in person or by registered mail (Sec. 161.11(a)), and, where the charge consists of unlawful grazing on the Federal range, the alleged violator will be ordered to remove the livestock within a reasonable time (Sec. 161.11(b)). Only if the violator fails to comply with the notice is the federal official authorized "to exercise the proprietary rights of the United States in the Federal range, under local impoundment law and procedure, if practicable", otherwise he is to invoke appropriate legal action by the United States (*ibid*).

There was no compliance with the notice provisions of the Federal Range Code on the part of the Government's agents (Fdgs. 21-28; R. 31-37; Conc. 3, R. 44-45). No notice was served (*ibid.*; R. 75-76). And the Utah abandoned horse statute, held by the court below to justify destruction of petitioners' animals, did not give petitioners the protection of the personally directed written notice required by the Federal Range Code, as it provides only for notice by publication.

In every respect material here, therefore, the provisions of federal and of state law are in conflict.

In those circumstances, can there then be any basis for supporting the holding below (R. 435) that the state law was applicable on the federal range? We turn to that question.

C. *The Reservation for State Police Power in the Taylor Grazing Act Did Not Permit the Utah Abandoned Horse Statute to Operate in the Very Sphere That Congress Was Regulating, viz., Grazing on the Public Domain*

The court below relied on Section 16 of the Taylor Grazing Act (43 U. S. C. § 315n; *infra*, p. 53), which is as follows:

> "Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however,* That nothing in this section shall be construed as limiting or restricting the power and authority of the United States."

Section 16 was not in the Taylor Grazing Act as introduced or as it passed the House. That portion thereof preceding the proviso was offered as an amendment on the Senate floor by Senator McCarran. 78 Cong. Rec. 11162. He offered no explanation; none was asked; and his amendment was adopted without a word of discussion.

The proviso was then added in conference. H. R. Rep. 2050, 73d Cong., 2d sess., pp. 2-3; 78 Cong. Rec. 12004; 78 *id.* 12167. The House managers explained their action as follows (H. R. Rep. 2050, *supra*, at p. 4; 78 Cong. Rec. at 12168):

> "Cannot invade Federal jurisdiction or authority, thus leaving the State laws in full operation."

It would be difficult, as an original proposition, to devise a more meaningless bit of equivocal self-contradiction.

Insofar as the body of Section 16 and its proviso, read together, have any meaning at all, they would seem in juxtaposition to be merely declaratory of existing law, namely, that state laws relating to health and welfare remain in effect, but that state laws dealing with the very subject-matter of the Taylor Act, viz., regulation of grazing, are necessarily inoperative.

This indeed was the result reached in the only other similar case arising under the Taylor Grazing Act, and it was a result foreshadowed by the generally recognized principles formulated in other cases involving apparent conflicts between state and federal legislation.

In *Noh* v. *Babcock*, 21 F. Supp. 519 (D. Idaho), Judge Cavanah held that Section 16 of the Taylor Act did not leave operative an Idaho statute purporting to regulate grazing.[2] He said (21 F. Supp. at 522):

> "* * * [a citizen] is only subject to the enforcement of the police power of the state where circumstances arise as to the conduct of those bordering on breaches of the peace and the avoidance of physical conflicts between cattle and sheep owners in case of invasion of cattle ranges by sheep herders, and in the protection of the health or public welfare. * * * The provision in the Taylor Grazing Act that it shall not be construed as restricting the state from enforcing its statute enacted for police regulation or regarding public health or public welfare cannot under the facts in the present case be applied or extended to the use of the federal public range, where Congress has exercised its power under the Constitution, but only in the instance above stated and when not in conflict with the Federal Constitution or statutes."

And he issued an injunction to restrain a prosecution under the Idaho statute, an injunction which was reversed on the sole ground that it related to a pending rather than only to a threatened prosecution. *Babcock* v. *Noh*, 99 F. 2d 738 (C.C.A. 9).

On the substantive issue, Judge Cavanah was clearly

[2] The same statute had been sustained in *Omacchevarria* v. *Idaho*, 246 U. S. 343, prior to the enactment of the Taylor Grazing Act and in the absence of federal range legislation.

right, for it has long been settled that, when Congress undertakes a regulatory scheme within its constitutional powers, such action renders inoperative state regulation in the same field, leaving to the State only such police powers as directly affect health, welfare and safety. *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163.

In the *Northern Pacific* case, just cited, the question was whether the Director-General of Railroads, after the wartime seizure of all rail transportation in 1917, had power to fix rates on intrastate commerce higher than those fixed by North Dakota, in view of Section 15 of the Act for the operation of the railroads under federal control (250 U. S. at 146; n. 1), "That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the state in relation to taxation or to the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds." This Court held that the quoted provision could not be interpreted to limit the comprehensive rate-making power vested by the Act in the Federal Government.

Again, in the *Dakota Central Telephone Co.* case, the question was whether South Dakota retained power to fix intrastate telephone rates after the 1918 wartime seizure of all telephone systems, in view of a proviso in the Joint Resolution authorizing the seizure (250 U. S. at 182) "That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems." Again, this Court held that there

was no room for the operation of state powers in the rate-making field.

Chief Justice White pointed out (250 U. S. at 185-186),

> "It was conceded that the words 'police power' were susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority, and the other a narrower one, including only state power to deal with the health, safety, and morals of the people."

And the Chief Justice went on to say that the narrower construction was necessary to prevent the anomaly resulting from a continuance of state power in a situation where Congress had assumed full control.

In the present case, the specific use in Section 16 of the Taylor Grazing Act of the words "public health or public welfare" is persuasive evidence that the narrower meaning of "police power" was intended.

The court below said (R. 435), "We find nothing in the Taylor Grazing Act that suggests an intent to suspend local law which is not in conflict with the provisions of the Act or the regulations promulgated thereunder." But the court below never considered the conflict already outlined above, and in particular it ignored the obvious difference between the requirements for notice: The Federal Range Code requires personal notice, the Utah statute is satisfied by publication.

It is no answer to suggest, as the Government now does (Br. Op. 8), that compliance with the written notice provision of the federal regulations "would render elimination from the federal range of abandoned animals difficult if not impossible as a practical matter." The present record shows that the Government's agents served personal notices under the federal regulations in the past without apparent difficulty (R. 132).

But the heart of the matter is that the notice provisions of the federal regulations are in irreconcilable conflict with the notice provisions of the state statute. That circumstance would be sufficient, standing alone, to demonstrate conclusively that, after the enactment of the Taylor Grazing Act and the promulgation of regulations thereunder, the operation of the Utah abandoned horse statute was suspended on the federal range.

Without prolonging the discussion, it is evident from the conflicts which have been pointed out that Congress did not intend to render nugatory its scheme of federal grazing regulations by permitting untrammelled play for overlapping and conflicting state legislation.

D. *The Government's agents were not authorized to invoke the Utah abandoned horse statute*

Additionally, it is clear that the Government agents in this case were not authorized even to invoke the Utah abandoned horse statute, much less to act as agents of the County Commissioners in executing it.

To begin with, there is nothing in the Taylor Grazing Act that empowers the Secretary of the Interior or any of his subordinates to rely on state enforcement machinery of any kind in the administration of that measure, and indeed Section 2 thereof (43 U. S. C. § 315; *infra*, p. 52), which contains a self-executing penalty provision, would appear to negative any such reliance. To the extent, therefore, that 43 CFR 161.11(b) (*infra*, p. 54) purports to authorize the range manager to invoke "local impoundment law and procedure," it is probably *ultra vires* the statute.

But a contrary assumption does not help the Government, for the Utah abandoned horse statute is not an impoundment law.

Impoundment under the Utah Code is regulated by Chap-

ter 12 of Title 4, U. C. A. 1953, entitled "Estrays and Trespassing Animals." That is the local impoundment law, which expressly declares that what the federal agents did here was a misdemeanor. Sec. 4-12-24 (*infra*, p. 55) provides that

> "Any person, other than the owner or his agent, who drives any horses, mules, * * * from their usual or customary ranges * * * farther than to the nearest or most convenient corral and neglects to return such horses, mules * * * immediately to their accustomed range or place from which they were driven is guilty of a misdemeanor."

To the extent, therefore, that the federal agents in this case could lawfully rely on state law, they committed not only a tort but a crime as well. For on that assumption, they were restricted to the "local impoundment law and procedure"—which does not include the Utah abandoned horse statute. The latter is classified in Title 47, U. C. A. 1953 under "Nuisances"—along with a chapter dealing with brothels.[3]

There was, therefore, no authority to proceed under the abandoned horse provisions. And insofar as the Government now urges (Br. Op. 8-9) that the abandoned horse law had already been repeatedly invoked, even after the enactment of the Taylor Grazing Act, the conclusive answer is that "Illegality cannot attain legitimacy through practice." *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524.

The short of the present case is that the Government relies for justification on the state abandoned horse statute which, after the enactment of the Taylor Grazing Act, had become inoperative on the federal range. Such reliance,

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[3] Both chapters are similarly combined in Title 64, U.C.A. 1943.

as the District Court held (Conc. 1, R. 41-42), does not justify the torts committed by its agents here.

II. EVEN IF THE UTAH ABANDONED HORSE STATUTE WERE APPLICABLE, ITS PROVISIONS WERE NOT FOLLOWED, AND ACCORDINGLY IT COULD NOT JUSTIFY THE SLAUGHTER OF THE INDIANS' HORSES FOR WHICH COMPENSATION IS SOUGHT HERE.

In this case, the district court held that the provisions of the Utah abandoned horse statute had not been complied with (Conc. 2; R. 42-44; R. 414-416), while the court of appeals held to the contrary (R. 435-438).

It seems significant to us, by way of preliminary, that the ruling that there had been no compliance with the Utah statute was rendered by the District Judge for the District of Utah, while that to the contrary was reached by three judges none of whom had any peculiar competence in Utah law; Judge Pickett, who wrote the opinion, is from Wyoming, while Judges Murrah and Savage, who concurred, are both Oklahomans. Thus there is applicable the rule, repeatedly enunciated by this Court, that since the district judge was from the Utah bar, his statement of what the Utah law is carries special weight. *Bernhardt* v. *Polygraphic Co.*, No. 49, Oct. T. 1955, decided January 16, 1956, pp. 6-7 of slip opinion, and cases there cited.

A. *Statutes such as the one here in question are to be strictly construed.*

The district judge held that the Utah statute, which provided for summary proceedings, must be strictly construed (R. 413-414, 416), while the court of appeals interpreted the act broadly.

The approach of the court of appeals in this respect constituted fundamental error. For, just as penal statutes are to be construed strictly (e.g., *FCC* v. *American Broad-*

casting Co., 347 U. S. 284, 296) and construction of a statute that avoids confiscation on a fair reading is invited (*Guessefeldt* v. *McGrath*, 342 U. S. 308), so statutes imposing a statutory penalty are likewise to be read strictly (*Tiffany* v. *Bank of Missouri*, 18 Wall. 409, 410), and "acts, imposing forfeitures, are always construed strictly against the government, and liberally as to the other parties" (*Shipp* v. *Miller's Heirs*, 2 Wheat. 316, 325, *per* Story, J.; *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 35).

Utah law is to the same effect. "It is true that it is the duty of courts to enforce the plain intent of the statute when the parties entitled to the benefit of the statute ask for its protection. Courts do not, however, and ought not, so interpret a legislative act that the property of one citizen is forfeited and lost to another, unless the plain and unequivocal mandate of the Legislature admits of no other rational construction." *Rospigliosi* v. *Glenallen Mining Co.*, 69 Utah 41, 51, 252 Pac. 276, 279; *Seaboard Finance Co.* v. *Wahlen*, 260 P. 2d 556, 561 (Utah 1953).

The district judge, in his oral opinion, said with reference to the Utah statute (R. 413-414, 416):

> "Now, that Section 161.11, together with the abandoned horse program in the provisions of the Utah statute to which you refer are summary proceedings. They are harsh and they are drastic. Those sections contemplate that official action be taken without an opportunity to hold a hearing and to have the matter judicially determined. Now, the law about that kind of a proceeding is that you have to follow the statute or the regulation strictly. As I said a bit ago, you have got to cross the t's and dot the i's. If you don't with exactness follow the letter of the statute or the regulation your action is void, without validity; illegal. * * *

"Now, you can't play fast and loose with those things. You must follow that statute and you must follow that regulation with particularity. . . .

"At any rate there are no presumptions of legality when it comes to the abandoned horse statute in this State, because that statute provides for harsh and drastic summary action. Every one of the requirements must be followed with particularity. The only thing that satisfies the statute is strict compliance."

The foregoing statement of the law as to statutes authorizing summary proceedings is in strict accord with all of the authorities. *Ex parte Buckley*, 53 Ala. 42, 56; *Souter* v. *The Sea Witch*, 1 Calif. 162; *Stidham* v. *Brooks*, 40 Del. 110, 120, 5 A. 2d 522, 526; *Village of Lovington* v. *Gregory*, 287 Ill. 169, 175, 122 N. E. 504, 506; *Karahalios* v. *Dukais*, 108 Me. 527, 530, 81 Atl. 1011, 1012; cf. *Corporation of Washington* v. *Pratt*, 8 Wheat. 681, 683. And this Court has had occasion to emphasize the necessity of strict compliance where a statute authorizes notice by publication. *Guaranty Trust &c. Co.* v. *Green Cove Springs R. Co.*, 139 U. S. 137, 148.

Tested by these undoubted general principles and by the specific provisions of the Utah statute under consideration, the court below was wrong, and the district court right, in their rulings as to whether the provisions of Utah law were complied with by the Government agents who wantonly destroyed petitioners' horses.

B. *The procedure followed by the County Commissioners of San Juan County was insufficient as a matter of Utah law to justify the seizure and slaughter of petitioners' animals.*

The findings in this case show very explicitly that Kinnaman, the federal Range Manager, approached the Board of

Commissioners with respect to a round-up of petitioners' horses under the Utah abandoned horse statute; that he then prepared and delivered a "Notice of Elimination of Abandoned Horses", dated July 10, 1952, for publication in a local newspaper; and that the notice was published once a week for four weeks from July 10 through August 8, and was thereafter posted in and around Monticello (Fdg. 21, R. 31-32).

The evidence shows that the minutes of the regular meetings of the Board of Commissioners for July 1 and August 5 are silent as to any discussion of abandoned horses and do not contain any resolution authorizing a round-up; that there were no special meetings during that period; that the purported authorizing resolution, dated July 9, was not adopted at any meeting held on that day, but was separately signed by the Commissioners at various places; and that this resolution was thereafter inserted in the minutes of the regular September 2 meeting, after publication of the notices thereunder had been completed. See references *supra*, pp. 5-7.

The district court found as a fact, after hearing the evasive (R. 362, 368, 414-416) and conflicting (R. 358-378, 375-376, 382-390) testimony of the Government's witnesses, that there was no board action to adopt this resolution prior to September 2 (R. 32, 42-43, 414-416).

The court of appeals ignored the trial judge's findings on this contested issue. It simply concluded (R. 436), "The procedure of the Commissioners may not measure up to the strictest parliamentary practice, but the record discloses that positive action was taken by the Board in a regular meeting. The fact that the Board later sought to complete its minutes by inserting a resolution therein would not affect the validity of its previous action." And the Government airily disposes of the issue by the comment (Br. Op.

10), "A question as to the date of a formal resolution is immaterial."

Examination of Utah statutes and decisions shows that the palpable perversion of the processes of orderly government which is disclosed by the present record cannot be so lightly disposed of, and that the district judge was correct in finding non-compliance with Utah law (Conc. 2; R. 42-44).

First. The record shows without contradiction that the Board of County Commissioners of San Juan County held their regular meetings on the first Tuesday of each month (R. 382). The first Tuesday in July 1952 was July 1. It is not contended the minutes show that any action with reference to abandoned horses was taken on that day.

The resolution purporting to authorize the institution of the abandoned horse program is dated July 9, 1952 (R. 32). The record shows that no board action was taken at that time (R. 31-32), and that this resolution was signed separately by the Commissioners (R. 387, 415). The district judge said (R. 415),

> "Now, that isn't an official action of the Board of County Commissioners when they signed that thing out there. It wasn't done in the regularly called meeting of the County Commissioners. That isn't a resolution of the Board of County Commissioners."

Nor can the July 9 "resolution" be given effect as having been passed at a special meeting. No formal special meeting was called between July 1 and September 2 (R. 150, 387). The Board did not meet on July 9 (R. 371, 383, 387). Moreover, the Utah statutes (U. C. A. 1953, Sec. 17-5-7; *infra*, p. 55) make very specific provision for the calling of special meetings of boards of county commissioners. The call must be signed and entered in the minutes, it must specify the business to be transacted at such special meeting, and five

days' notice must be given to all members not joining in the order.

That such safeguards against informal action are not lightly to be disregarded in Utah is attested by the circumstance that a similar provision, now U. C. A. 1953, Sec. 17-15-1, requiring that every ordinance adopted by a board of county commissioners be signed by the members voting for or against, was held to be mandatory, and to render an unsigned ordinance void. *Summit County* v. *Gustaveson*, 18 Utah 351, 54 Pac. 977. And the general rule in Utah is that acts of a county board not in accord with statute are void. *Auerbach* v. *Salt Lake County*, 23 Utah 103, 63 Pac. 907.

Moreover, the law is well settled that a board of county commissioners must act as a body and that actions taken by the commissioners as individuals are of no validity. *Rockingham County* v. *Luten Bridge Co.*, 35 F. 2d 301, 304-305 (C. C. A. 4), quoting with approval what was said in *Paola, etc. R. Co.* v. *Anderson County Com'rs*, 16 Kan. 302, 310: "Commissioners casually meeting have no power to act for the county. There must be a session of the 'board'. This single entity, the 'board', alone can by its action bind the county. And it exists only when legally convened." And see, for collections of cases to the same effect, 1 McQuillin, *Municipal Corporations* (3d ed. 1949) § 1.88 at pp. 316-317; 14 Am. Jur. 204, Counties § 32; 20 C. J. S. 855 *et seq.*, Counties, §§ 87, 88a.

It is therefore plain that, prior to the insertion of the purported July 9 resolution in the minutes of the September 2 meeting, there was no official county action. We are therefore faced with the question whether any formal resolution was required by the statute—the court of appeals thought not (R. 436)—or whether, in any event, as the Government now contends (Br. Op. 10), there was an effective ratification of the program.

Second. The Utah statute (U. C. A. 1953, Sec. 47-2-4; *infra*, p. 56) provides:

> "The boards of county commissioners may provide for the elimination of abandoned horses in the respective counties in the following manner:
>
> "*They shall cause notice to be published* at least once a week for three successive weeks in some newspaper * * *" [Italics supplied.]

The statute clearly requires action by the county board, viz., "they shall cause notice to be published." Perhaps the statute does not specifically require any formal resolution, but formal board action is still necessary, and both Kinnaman and the Commissioners evidently thought that a resolution was required, because the one made request therefor, and the others complied. And the Board on previous occasions had passed resolutions prior to invoking the Utah abandoned horse statute (R. 386).

In any event, the Board of County Commissioners in July did not cause any notice to be published. Only Kinnaman caused a notice to be published. There was no valid board action prior to September 2, and by that time the notices had all been published. Such action did not comply with the statute, and there is no room for the doctrine of relation back in these circumstances. Action taken by county commissioners not in strict accordance with statute is void (*Summit County* v. *Gustaveson*, 18 Utah 351, *supra*), acts imposing forfeitures are construed strictly in favor of the individual (*Shipp* v. *Millers' Heirs*, 2 Wheat. 316; *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29), and statutes authorizing summary proceedings must be strictly followed (*supra*, pp. 25-26).

Thus, on examination, it is seen that the court of appeals' holding that the provisions of the Utah abandoned horse

statute were complied with not only ignores governing general principles, but settled Utah law as well.

C. *Petitioners' horses were in any event not abandoned within the meaning of the Utah abandoned horse statute*

The following definition of abandoned horses is contained in the Utah statute (U. C. A. 1953, Sec. 47-2-1; *infra*, p. 55):

> "The term 'abandoned horse' as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded."

The district judge found and concluded *inter alia* as follows:

> "* * * That said agents knew beyond any possible doubt to whom said horses belonged; that said agents knew at all times that the horses involved in this action belonged to plaintiffs or to some of them." (Fdg. 27; R. 36.)
>
> "The horses of plaintiffs were plainly branded, and some of the brands thereon were duly recorded in accordance with State law; the said agents and employees of defendant knew these brands to be the brands used by plaintiffs as well as they knew that the horses belonged to plaintiffs." (Fdg. 30; R. 38.)
>
> "The provisions of this State statute could not apply

here for the further reason that the horses involved were not 'abandoned' as contemplated by the statute. They were everything but abandoned. They were used daily in the performance of the work of their owners, the plaintiffs, and this was well known by defendant's said agents and employees. The horses were not unbranded, but they were branded and with brands recorded and decipherable." (Conc. 2; R. 43-44.)

The court of appeals did not question the findings above quoted, but assumed, in disregard of them, that petitioners' horses were within the statute, and went on to say (R. 437) that "The dictionary definition of the term 'abandoned' has no application."

The Government makes no attempt to support the court of appeals' construction of the statute, but simply says, citing record references (Br. Op. 8), that "Petitioners offered no records to sustain their assertion that the animals bore recorded brands. A search of the records by government employees showed that no brands were registered."

So far as the issue of recorded brands was concerned, obviously the recording books or certified extracts therefrom were the best evidence. 4 Wigmore, *Evidence* (3d ed. 1940) §§ 1173-1174, 1177-1282. Neither side produced such evidence. Instead, both sides relied on oral evidence, which, though inadmissible, was not objected to. Petitioners' witnesses testified that their brands *were* recorded (R. 201, 246, 258), the Government's witnesses testified to the contrary (R. 147, 292-298, 309-310, 333). The trial judge resolved this conflict of oral evidence in petitioners' favor (Fdg. 30, R. 38; Conc. 2, R. 43-46). Since he saw and heard the witnesses, his finding is obviously not "clearly erroneous" (Rule 52(a), F. R. Civ. P.) and so must stand, particularly in view of his repeated observations concerning

the poor veracity of the principal Government witnesses (R. 104, 108-109, 160).

On this footing, petitioners' horses were not within the statute.

But even if some of them were (cf. Pdg. 30, R. 38, with Conc. 2, R. 43-46), there is still no warrant for the court of appeals' cavalier assumption (R. 437) that "The dictionary definition of the term 'abandoned' has no application." For, after all, the Utah abandoned horse law is a summary statute, which even the court of appeals deemed "harsh" (R. 438); can it be supposed for a moment that the canon requiring strict construction of such legislation (*supra*, pp. 25-26) will permit any persons purporting to exert governmental power to treat as abandoned, horses that were in fact not abandoned and whose ownership was known to such officers? We think not. For to apply the harsh procedure of the Utah law in these circumstances would be, not to abate a nuisance, which is what Utah has declared abandoned horses to be (*supra*, p. 23), but to attempt to cloak with an aura of colorable legality what the trial judge after hearing the testimony characterized as "just a cold-blooded depredation" (R. 226).

The court of appeals said (R. 437-438), "The actual knowledge of the ownership of the abandoned animals by the County Commissioners or those in charge of the elimination program in their behalf is not material, and the Utah statute is clear on the subject." No authority was cited for that proposition, and none, we believe, is available. The rule of strict construction (*supra*, pp. 25-26) points in precisely the opposite direction.

III. EVEN IF THE PROVISIONS OF THE UTAH ABANDONED HORSE STATUTE SHOULD BE HELD TO HAVE BEEN COMPLIED WITH TO THE LETTER, ITS APPLICATION TO THESE PETITIONERS INVOLVED A DENIAL OF CONSTITUTIONAL PROTECTIONS.

Under this heading we assume, but only for purposes of argument, that the provisions of the Utah abandoned horse statute were fully complied with, and, on that assumption, go on to show that even full compliance therewith involved a denial of constitutional protections to these petitioners. First, the notice prescribed by the Utah statute was so inadequate as to amount to a deprivation of due process; second, the statute was applied so as to discriminate against the Indian petitioners in such a way as to deny them the equal protection of the laws.

A. *Publication and posting of notices in English where illiterate and non-English speaking Indians are sought to be affected is so patently inadequate as to involve a denial of due process of law.*

The court below overlooked a fatal defect in the procedure adopted by the Government agents who killed petitioners' horses: No adequate notice was given them as warning of the catastrophic loss that impended.

The district judge made an explicit finding (Fdg. 15, R. 27) that "Plaintiffs speak only the Navajo language, which is an unwritten language * * *." The district judge made a further finding (Finding 21, R. 31-33) that the notice inserted by Kimmaman in purported conformity to the Utah statute was in English, was published in the San Juan Record once a week for four weeks, and that five such notices were posted in the City of Monticello "and at various places surrounding and within the area herein concerned * * *." Finally, the district judge made specific findings (Fdgs. 27, 28; R. 36) "That said agents

knew beyond any possible doubt to whom said horses belonged; that said agents knew at all times that the horses involved in this action belonged to plaintiffs or to some of them [;] That defendant's agents and employees * * * knew, at all times herein concerned, to whom the horses belonged which they planned to and did kill * * *."

'We think that from those findings—which were not disturbed by the court below—it follows that the seizure and destruction of petitioners' horses entailed an application of state law that deprived petitioners of due process of law, in that the notice given them was patently inadequate.

For this proposition it is only necessary to cite a recent decision of this Court, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, which held incompatible with the Fourteenth Amendment a notice by publication designed to serve as a basis for conclusively adjudicating the property rights of known persons whose whereabouts were known.

As the Court there said (339 U. S. at 315),

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

It would be difficult to imagine a method less calculated to convey information to illiterate Navajos than the posting of notices in English, or the publication of such notices in a newspaper which they would be unable to read if they wished to do so. Certainly the San Juan Record was not a newspaper generally circulating among these petitioners.

What was said in the *Mullane* case as to the inadequacies of notice by publication generally warrants repetition here (339 U. S. at 315):

"It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greatest number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint."

That being true of a notice addressed to literate persons having knowledge of the language, can it be contended for a moment that a notice published in English is to be regarded as sufficient to charge illiterate Indians conversant only with the unwritten Navajo tongue? To ask that question is to answer it.

Here, moreover, as the district judge found, the Government agents publishing and posting the notice were fully aware of the identity of those whose property they were seeking to affect. In that situation, the further remarks of this Court in the *Mullane* case become apposite (339 U. S. at 318):

"Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability

notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

In the present case, the district judge also found (Fdg. 24, R. 34) that "It was the plan of defendant's said agents to kill only the horses belonging to plaintiffs and others of their small independent band of Indians, and not to destroy or to gather the horses of others." It cannot therefore be contended for a moment that the Government agents were not in a position to give personal notice to those about to be affected by their "abandoned horse" drive.

Finally, the Court in *Mullane* said (339 U. S. at 319):

> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand."

There is no need to prolong the discussion; the *Mullane* case, without more, demonstrates the utter inadequacy in the present circumstances, as a matter of constitutional law, of the notice provided for by the Utah statute. Indeed, it is a fair inference from the findings of the trial judge that notice by publication was resorted to by the Government agents precisely because it did not amount to notice in fact, and so would further and facilitate the real objective of the plan of Kinnaman et al., which, as the district judge also found, was to deprive these Indians of the animals esential to their way of life, and thus to force them to leave the area (Fdgs. 20, 29, 3; R. 30-31, 37-38, 40-41).

The Government argues (Br. Op. 11) that the undisputed

testimony of the Asistant Range Manager is that he warned the Indians in August and September 1952 that there was going to be a horse round-up, citing what is now R. 132-134.[4] But this was the testimony of Black, whom the district judge disbelieved, for reasons cogently stated at R. 414:

> "Now there is only a pretension of an excuse for that here in my judgment, when these fellows say they didn't know they were running off Indian horses. I just don't believe it. And I observed their conduct on the witness stand. They were evasive. I observed their extreme reluctance to testify. * * * I observed in the case of Dee Black that finally he said he thought he had a notion as to who owned the horses. He thought they belonged to the Indians all right."

And see the trial court's further comments on Black at R. 171, 220, 269, and 404.

Consequently, anything Black may have said that is not affirmatively reflected in the findings amounts, not to "undisputed testimony" as the Government contends (Br. Op. 11), but simply to disbelieved testimony.

The Government further says (Br. Op. 11), "Petitioners do not suggest what other kind of notice could have been given. Certainly the Indians are not exempt from the rules and regulations governing the conduct of citizens with reference to federal property."

The short—and obvious—answer is that if the Government's agents here had complied with "the rules and regulations governing the conduct of citizens with reference to federal property", which, as we have shown (*supra*, pp. 16-17), were the rules and regulations set forth in the Fed-

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[4] The record references in the Government's Brief in Opposition are to the Court of Appeals transcript, the pagination of which differs from that of the printed record now before this Court.

eral Range Code, 43 CFR 161.11 (*infra*, p. 54), they would have given these petitioners notice, by personal service or registered mail. That is the kind of notice that the applicable law required to be given; that is the "other kind of notice" that "could have been given"; that is the "other kind of notice" that these agents had in previous years given these very Indians (R. 132).

B. *The record shows a discrimination against these Indian petitioners so palpable as to constitute a denial of equal protection of the laws.*

The district judge found (Fdg. 4, R. 20) that, after the creation of Utah Grazing District No. 6 pursuant to the provisions of the Taylor Grazing Act, permits to graze in the area used by petitioners were issued to white livestock operators, and also that, until 1946, petitioners were not disturbed in their use of those lands for grazing purposes in common with non-Indians (Fdg. 17, R. 28).

It was stipulated that, within the area in dispute, 3899 cattle and 33818 sheep are under permit from the Bureau of Land Management to white livestock operators (R. 410). This was the area from which the Government's agents drove and then destroyed 38 burros and 116 horses belonging to petitioners (R. 280).

In view of the provisions of the Taylor Grazing Act set out and discussed above, this amounted, on its face, to a discrimination between Indians and whites so utterly without justification as to involve a taking of petitioners' property without due process of law (*Bolling* v. *Sharpe*, 347 U. S. 497, 499).

But there was a further discrimination in the administration of the Utah abandoned horse statute, the statute on which the court of appeals relied, and the Government in this Court now relies, to justify the United States' spoila-

tion of these petitioners: That was in the Government agents' application of the redemption provisions.

The district judge found that, inasmuch as it was the Indians themselves that the Government's agents sought to remove through destruction of their horses, those agents did not intend to permit any redemption of Navajo horses, and granted no opportunity for redemption (Fdg. 24, R. 34).

The findings also disclose the following:

On one occasion, where one of the petitioners located his horses and asked to be permitted to reclaim them, payment of $60 per head was demanded by Government agent Black, a sum Black knew the Indian was unable to pay (Fdg. 26, R. 35).

On another occasion, petitioner Hosteen Sakezzie and his family tracked their animals 35 miles to a corral, where Sakezzie requested the said Black to return his horses. During the conversation, one of the white stockmen who was with Black left in his car and returned in a few minutes with several men armed with rifles, the loading mechanisms of which were worked before the Indians to convey to them the understanding that the Government agents were prepared to shoot the Indians if they attempted to retake their horses. Petitioner Sakezzie and his family became so frightened and intimidated by the threatening display of firearms that they departed peaceably and returned to their hogán without obtaining their horses. (Fdg. 27, R. 35-36.)

White men whose horses were gathered up by the Government agents were treated differently. "About 5 head of horses belonging to white men were in this range area and were unavoidably gathered with some of the plaintiffs' horses. The horses belonging to these white citizens were hauled directly to the corrals or pastures of the owners and

a fee of $2.50 per head to cover expenses was charged by defendant's agent." (Fdg. 26, R. 35.)

The record simply reeks with discrimination, directed against these Navajo Indians as a class. There was nothing accidental about what was done; the trial judge specifically found that the Government's agents intended to capture only the horses belonging to the petitioners (Fdg. 24, R. 34).

We submit that the foregoing facts establish, on their face, an unconstitutional denial of equal protection of the laws under color of state action. There is presented here an instance falling squarely within this Court's classic denunciation in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374:

> "* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

No fair or open minded person reading the present record can fail to conclude that Government agents here administered the Utah abandoned horse statute, under which they purported to act and which they now invoke to justify their actions, with a completely unequal hand and a thoroughly evil eye.

IV. THE DISTRICT COURT'S AWARD OF DAMAGES WAS PROPER

Analysis of the law and facts underlying the district court's judgment for damages shows that such judgment was proper.

A. *The evidence supports the award.*

At the close of the case, the district judge said in his oral opinion (R. 413):

> "* * * Damages are awarded against the defendant in the sum of $100,000.00 in this case.
>
> "Now, with respect to that, I doubt the testimony of several witnesses here with respect to the value of their own horses, and moreover, I accept the testimony of several witnesses here with respect to the consequential damage that flowed from the wrong involved in destroying these horses. There is elaborate testimony about the consequential damages to these individuals."

The district court then went on to make very specific findings as to the market value of the destroyed horses, their uniqueness, and their replacement cost (Fdg. 1, R. 39-40); as to the consequential damages suffered by petitioners (Fdg. 2, R. 40); and as to the damages to them by reason of pain and suffering (Fdg. 3, R. 40-41).

Those findings are supported by evidence (R. 284-286, 290, 325-330).

The trial judge was of course free to reject the evidence of value testified to by the government witnesses whom he disbelieved because of their shifty demeanor while on the stand (R. 414), and to reject as well the testimony as to what the destroyed horses were worth to the glue factory (R. 140, 142-153, 293). To suggest the latter as a proper measure of damages is to urge that the taking of an automobile is compensable by its value as scrap.

Without prolonging the discussion, it seems sufficient to point to Rule 52(a), F. R. Civ. P., which renders the findings as to value impregnable to attack, cf. *United States* v. *Grigalauskas*, 195 F. 2d 494 (C. A. 1), and to *Palmquist*

v. *Mine & Smelter Supply Co.*, 25 Utah 257, 70 Pac. 995, which reaffirms the Utah rule that a verdict for damages will not be set aside as excessive so long as there is any evidence to support such damages.

In the court below, the Government did not attack the further findings as to consequential damages, but contended that such damages were not recoverable as a matter of law. That contention is also unsound.

B. *The items of damage reflected by the judgment were proper under the Federal Tort Claims Act.*

The touchstone of the United States' liability under the Tort Claims Act is set forth in 28 U. S. C. § 2674,

> "The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

No element of interest is reflected in the judgment involved here, nor was anything awarded by way of punitive damages. Similarly, no item for which damages were awarded by the district judge falls within the only other exception in the Tort Claims Act that is applicable here, viz., 28 U. S. C. § 2680(h):

> "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

It is true that the Government argued in opposition to the Petition for Certiorari (Br. Op. 9-10) that "an attempt to support the judgment under the Federal Tort Claims Act on a theory of malicious enforcement of a regulatory statute is fruitless because of the exclusion from

that Act of claims arising out of 'malicious prosecution, abuse of process,' " citing the foregoing provision. But that contention is aimed at a man of straw, not at petitioners' actual case. Petitioners sought recovery, not for malicious prosecution, not for abuse of process, but for the taking and destruction of their horses and burros, and for the damages consequent thereto (Complaint, R. 5-7). Their horses were destroyed, and every item of consequential damage for which recovery was adjudged not only was within the Tort Claims Act, see *Grigalauskas* v. *United States*, 103 F. Supp. 543 (D. Mass.), affirmed, 195 F. 2d 494 (C.A. 1), but was a proper subject for damages as a matter of Utah law.

Under Utah law, the basic measure of damages in tort cases includes the necessary and usual results of the wrong—the general damages—together with such special damages as are directly traceable to the wrongful acts complained of. *McKinney* v. *Carson*, 35 Utah 180, 99 Pac. 660.

Where property is destroyed, the measure is the difference between the market value of that property immediately before destruction, plus its use value until it can be replaced within the time required of a prudent plaintiff, less any salvage value of the destroyed property. *Park* v. *Moorman Mfg. Co.*, — Utah —, 241 P. 2d 914, 921. Here, as the district judge found, the salvage or glue-and-dog-food value of the destroyed animals was never paid to petitioners, but was retained by the Government or its agents (Fdg. 24, R. 34).

Deprivation of use has always been held to be a proper element of recovery (*Bergstrom* v. *Mellen*, 57 Utah 42, 192 Pac. 679), and reasonable rental value is a proper measure for such deprivation (*Anderson* v. *Jensen*, 71 Utah 295, 265 Pac. 745).

Pain and suffering, where it is the necessary and natural result of the defendant's acts, is compensable (cf. *Palm-*

quist v. *Mine & Smelter Supply Co.*, 25 Utah 257, 70 Pac. 994; *Webb* v. *Snow*, 102 Utah 435, 132 P. 2d 114), and, where the defendant's acts have been wanton and willful—as indeed they were in this case—damages for fright can also be recovered (*Jeppsen* v. *Jenson*, 47 Utah 536, 155 Pac. 429).

Here the horses that were destroyed had a unique value because of the nature of their training and the difficulty in replacing them, all as is duly set forth in Fdg. 1 (R. 39-40). Any contention by the Government that it should be liable only to the value of ordinary horses is as untenable as an argument that a tortfeasor's liability to pay damages for loss of earning power (*Clawson* v. *Walgreen Drug Co.*, 108 Utah 577, 162 P. 2d 759) is satisfied on the basis of average earnings in the community even though the specific injured person was prior to the tort, an individual in the high income brackets.

Utah law excludes only remote, conjectural, or contingent losses (*Graham* v. *Street*, 2 Utah 2d 144, 270 P. 2d 456). No such items are reflected in the detailed findings (1-3, R. 39-41) on which the trial court's judgment in petitioners' favor was based.

C. *The Judgment Was in Proper Form*

The present action was brought by thirty separate plaintiffs because of the common nature of their claim; it is not disputed that such joinder was proper under the first sentence of Rule 20(a), F. R. Civ. P., viz.: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

A single judgment for damages was granted in petitioners' favor (R. 47-48), and the court of appeals questioned

"whether the entry of a joint judgment in a case of this kind, where each plaintiff has a separate claim, is in accordance with Rule 20(a)" (R. 433).

That query involves the last sentence of Rule 20(a), viz., "Judgment may be given for one or more of the plaintiffs according to their respective rights to relief * * *."

The most scholarly commentator on the Civil Rules (3 Moore, *Federal Practice* (2d ed.) ¶20.05, p. 2722) has said that the sentence just quoted "gives the court ample power to mould its judgment to fit the merits of the case."

We think that only particular petitioners have standing to complain of the form of the judgment—and none has made complaint. To that extent, the rights of an individual petitioner to a separate judgment has been waived. Cf. *United States* v. *Runner*, 174 F. 2d 651, 652 (C. A. 10). Moreover, to the extent that formal apportionment of the judgment seems necessary, a basis therefor is found in the schedule of ownership stipulated into the record (R. 279-280).

V. THE GOVERNMENT'S AGENTS WERE PROPERLY ENJOINED FROM FURTHER INTERFERING WITH PETITIONERS

As has been shown, the United States brought suit in 1950 to enjoin the Navajos, including some of the present petitioners, from grazing any of their stock in the area now in question, and that suit was dismissed on the ground that it would require the district court to perform duties vested by law in the Secretary of the Interior. *United States* v. *Hosteen Tse-Kesi*, 93 F. Supp. 745 (D. Utah). The Tenth Circuit reversed and reinstated the complaint on the merits. *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (August 30, 1951).

These depredations followed, from September 19, 1952, to February 20, 1953 (R. 54, ¶7), after which the Bureau of Land Management represented "that the defendants have returned to the Reservation and that there are no more

trespassers." The district court on June 27, 1953 accordingly dismissed the suit against *Hosteen Tse-Kesi, et al.* as moot. (Fdg. 18 at R. 29.)

It appeared at the trial of the present case that Kinnaman, the instigator of the depredation here complained of, was aware of the pendency of the *Hosteen Tse-Kesi* proceeding when he put the abandoned horse program into effect (R. 76-78), a circumstance that led the district judge to make reference to the statute denouncing the obstructing of justice (R. 78). Then, when Kinnaman further admitted that he was continuing right at the very time of the trial of the present case, to destroy any horses he found (R. 84), the district judge directed counsel for the petitioners to prepare a temporary restraining order (R. 84), saying further:

> "That litigation was pending here at the time these fellows took this matter into their own hands. You have a very serious situation, not just with respect to whether they recover damages; I am talking about an indictment. I am talking about contempt of this court. I am talking about obstructing justice by people who are parties plaintiff to the litigation in this court—the Bureau of Land Management, taking the matter into their own hands, going out and destroying property belonging to the defendants; to a proceeding in this court which was not disposed of, which was pending here."

Later in the trial, the judge said (R. 222-223):

> "As a matter of fact, the depredations of which there is complaint here were committed while this court had pending before it the very questions we have here. The Bureau of Land Management officials, it seems to me, may very well be in contempt of this court, because the Bureau of Land Management was the plain-

> tiff in that action and while this action was pending here they saw fit to take the matter into their own hands. * * * I think that force and violence ought to end in this matter—and before we get through I am going to issue an injunction about that, so that the folks will be answerable to me. I am going to reserve some jurisdiction for that purpose here."

And thereafter, but still during the trial, the district judge reiterated his purpose to enjoin further depredations (R. 274, 276), and he repeated that purpose in the course of his oral opinion (R. 417-418).

Accordingly (R. 48-49), jurisdiction was retained to determine the question of petitioners' rights to the land in question—which had been the basic issue in the *Hosteen Tse-Kesi* case—and "defendant, its officers, agents and employees, individually and collectively, and all others acting in behalf of" or in cooperation or conjunction with the foregoing were enjoined:

> "from the further harassment or molesting of plaintiffs, their families and the members thereof, in their quiet and peaceable possession, and use of the said public lands; from the killing, molesting, driving, moving or interfering with the livestock owned or operated by plaintiffs upon these public lands, and from taking further action under any of the applicable laws and regulations to dispose of any of said lands or any interests therein * * *."

In the circumstances disclosed by the record, was the foregoing injunction proper?

Petitioners concede that, since the United States cannot be sued without its consent, it was improperly named as a party to the injunction, and therefore, agree to a modifica-

tion of the order accordingly. But the injunction was entirely proper as against the officers and agents of the United States, and indeed was required under familiar equitable principles.

The record showed that Kinnaman proceeded to carry out his abandoned horse program well knowing that litigation to determine rights of occupancy to the area was pending in a court of the United States—as flagrant a flouting of judicial authority as can be imagined. The record also shows that, after Kinnaman's depredations were virtually completed, counsel for the United States represented that the case had become moot because "the defendants have returned to the Reservation" (Fdg. 18 at R. 29). In view of the circumstance that petitioner's removal had been effected involuntarily by Kinnaman and other agents of the United States, that representation fell substantially short of the candor which counsel are normally expected to display when seeking dismissal of pending litigation.

The record further shows that Kinnaman, even while testifying, brazenly announced from the witness-stand that he proposed to destroy any further horses that he found (R. 84).

And, finally, the record shows that the land on which the fields and hogan of the petitioner Sakezzie were located had been awarded as grazing range to Delbert and Leland Redd (R. 122-123). The latter had assisted Black in the round-up of petitioners' horses (R. 136, 141, 396, 397); he had demanded and received $480 from an Indian whose sheep he had impounded (R. 172); and he admitted having written the Secretary of the Interior urging action to rid the area of Indian use (R. 400-401).

In those circumstances, an injunction to prevent further interference of any kind with petitioners was amply justified. It is well settled that there is equitable jurisdiction

where the injury complained of is of a continuous character (*Osborne* v. *Missouri Pacific R. Co.*, 147 U. S. 248, 258-259), or where complaint is made of a continuing trespass (*Archer* v. *Greenville Sand & G. Co.*, 233 U. S. 60, 66). Similarly, an injunction lies to prevent future wrong (*Swift & Co.* v. *United States*, 276 U. S. 311, 326). The power of equity to enjoin a multiplicity of suits has never been doubted (*Insurance Company* v. *Bailey*, 13 Wall. 616, 621; *cf. Texas* v. *Florida*, 306 U. S. 398, 406-407). And of course a court has jurisdiction to effectuate its own decrees to avoid relitigation (*Root* v. *Woolworth*, 150 U. S. 401, 411-412).

In view of these authorities, which are of course in no sense unique, it is plain that, except for the inclusion of the United States as a party against whom it was directed, the injunction issued by the district court was eminently proper.

Conclusion

Unless it is now to be held that the United States has a right to despoil its Indian wards with impunity, the judgment below must be reversed, and that of the district court affirmed. Moreover, the injunction of district court should be reinstated, subject to the modification just indicated.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

A. Federal Statutes

The Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended, 43 U.S.C. §§315 *et seq.*, provides in pertinent part as follows:

Section 2, 43 U.S.C. §315a.

> The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of Section 1 of this Act [section 315 of this title], and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act [chapter] and to insure the objects of such grazing districts, namely to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * * and any willful violation of the provisions of this Act [chapter] or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

Section 3, 43 U.S.C. §315b.

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who

are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *.

Section 5, 43 U.S.C. §315d.

The Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; * * *

Section 16, 43 U.S.C. §315n.

Nothing in this Act [chapter] shall be construed as restricting the respective State from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act [chapter], impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however,* That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

B. Federal Regulations

The pertinent provisions of the Federal Range Code, 43 CFR 161.1 *et seq.*, provide:

Sec.161.6 *Issuance of licenses and permits*—(a) *Free-use licenses and permits.* Free-use licenses or permits first will be issued to free-use applicants for not to exceed the number of livestock kept for domestic purposes. Such livestock shall be grazed on Federal range in the immediate neighborhood of the residence of the licensee or permittee.

Sec. 161.11 *Procedure for enforcement of rules and regulations*—(a) *Service of notice.* Whenever it appears that there has been any willful violation of any provision of the act or of the Federal Range Code for Grazing Districts, the range manager will cause the alleged violator and any interested lien holder who has filed notice of his lien with the Bureau of Land Management to be served with a written notice, which will set forth the act or acts constituting such violation and in which reference will be made to the provision or provisions of the act or the Federal Range Code for Grazing Districts alleged to have been violated. Such notice may be served in person or by registered mail and the affidavit of the person making personal service or the registry receipt shall be preserved.

(b) *Unlawful grazing on Federal range; removal of livestock; impoundment.* Whenever the charge consists of unlawfully grazing livestock on the Federal range, the notice served on the alleged violator and any interested lien holder who has filed notice of his lien with the Bureau of Land Management will order the alleged violator to remove the livestock or to cause them to be removed immediately or within such reasonable time as may be specified. If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary right of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator.

C. State Statutes

The Utah Code Annotated, 1953, insofar as pertinent here, provides:

4-12-24. *Unauthorized removal of animals from range —Misdemeanor.*

Any person, other than the owner or his agent, who drives any horses, mules, cattle or sheep from their usual or customary ranges or from any field, yard or street farther than to the nearest or most convenient corral and neglects to return such horses, mules, cattle or sheep immediately to their accustomed range or place from which they were driven is guilty of a misdemeanor.

17-5-7. *Special meetings—How called—Business limited*

If at any time the business of a county requires a special meeting of the board, such meeting may be ordered by a majority of the board or by the chairman thereof. The order must be signed by the members or chairman calling such meeting and must be entered in the minutes of the board. Five days' notice of such meeting must be given by the clerk to the members not joining in the order. The order must specify the business to be transacted at such meeting, and none other than that specified shall be transacted at such special meeting unless all the members are present and consent thereto.

The Utah abandoned horse law, Chapter 2 of Title 47 of the Utah Code Annotated, 1953, is as follows:

47-2-1. *"Abandoned Horse" Defined*

The term "abandoned horse" as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for,

and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded.

47-2-2. *"Open Range" Defined*

The term "open range" means all land not privately owned, and includes all roads, outside of private inclosures, used by the public, whether the same have been formally dedicated to the public or not.

47-2-3. *Abandoned Horses on Open Range, A Nuisance.*

It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range, and every abandoned horse is declared to be a public nuisance and a public menace, and is condemned subject to the right of its owner to reclaim it under the conditions hereinafter provided.

47-2-4 *Elimination by County Commissioners—Notice of Intention.*

The board of county commissioners may provide for the elimination of abandoned horses in the respective counties in the following manner:

They shall cause notice to be published at least once a week for three successive weeks in some newspaper of general circulation published in the county, and such notice shall also be posted in at least five public places outside of the county seat on public highways in such county, and in three public places at the county seat, one of which shall be at the front door of the court house. The notices posted outside of the county seat shall be posted not less than two miles apart, and

all posted notices shall be posted at least thirty days before the date which the county commissioners shall fix for the beginning of the elimination of abandoned horses from the range in such county as hereinafter provided. If no newspaper is published in the county, publication in a newspaper shall not be required.

Such notice shall be substantially in the following form:

Notice is hereby given that in accordance with the provisions of law the board of county commissioners of ..... County, Utah, will proceed to eliminate abandoned horses from the open range in said county, and that beginning on the ..... day of ....., 19..., a drive will be held, and all abandoned horses running upon the open range will, under the direction and supervision of the county commissioners, be eliminated. All owners of horses running upon the open range are hereby given notice to file with the board of county commissioners a description of such horses, and the brands or marks thereon.

Dated this ..... day of ....., 19...

By order of the board of county commissioners of ..... County, Utah.

.....
County Clerk.

47-2-5. *Elimination by County Commissioners—Method.*

The manner and method of eliminating abandoned horses from the open range shall be in the discretion of the board of county commissioners, and it shall be its duty to so eliminate abandoned horses, using the means most effective and economical under the circumstances. The board may, in its discretion, sell all captured horses.

47-2-6. *Owners May Repossess—Damages—Taxes.*

Any person owning any horses which are running at large in any county in which the board of county commissioners has given notice of intention to make a drive, as provided in this chapter, may within thirty days after posting or the first publication of the notice mentioned in section 47-2-4 file with the board of county commissioners a description of such horses claimed by him, giving the marks and brands, if any, which appear thereon, and, if the board of county commissioners shall take into its possession any horses so claimed, it shall by registered letter addressed to the owner or claimant of such horses notify him that the same may be claimed within ten days from the mailing of such notice; and such owner or claimant shall be permitted upon application to the board to take possession of such horses upon payment of the expense of caring for the same from the date of capture. If any horses are killed by the county commissioners under the provisions of this chapter, a description of which has been reported by the owner thereof to the board, and ownership of such animals can be satisfactorily established, such owner shall receive as damage therefor a sum not exceeding $10 for each animal; *provided*, that he has paid all taxes assessed against said animal; *provided further*, that payment of such claims may be made only from proceeds of sales of captured horses.

47-2-7. *Elimination from Private Property on Request.*

Abandoned horses may be eliminated from privately owned land by the board of county commissioners in the same manner as from the open range when requested so to do by the owner of such land.